Notes

BANNING THE CULTURAL EXCLUSION: FREE TRADE AND COPYRIGHTED GOODS*

I. INTRODUCTION

For centuries people have expressed themselves through creative works of art and literature, and since 1557 artists and authors have been able to protect their rights to their creative works through various national copyright laws.[1] National copyright laws basically grant a monopoly in the use of the work to its creator.[2] Copyrighted goods, however, are often easily transported across national boundaries, and thus national copyright laws may provide inadequate copyright protection in the international marketplace.[3] The necessity for international copyright protection has been met to some extent by copyright conventions. International copyright conventions, like national copyright laws, define the scope and duration of the creator's right to receive financial remuneration for his or her creative works.

Both international copyright conventions and domestic copyright laws may conflict with the concept of free trade. Free trade among nations is a concept which has increased in importance over the last

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1. Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1135 (1983). In America, the federal Constitution addresses copyright issues. U.S. CONST. art. I., § 8, cl. 8. Federal copyright statutes have been in effect since 1790, *see* Abrams, *supra*, at 1178; current American statutes on copyright are found in chapter 17 of the United States Code.

2. Abrams, *supra* note 1, at 1120-22.

3. WILHELM NORDEMANN ET AL., INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW 4 (R. Livingston trans., 1990). Copyright is a type of intellectual property. Patents and trademarks are also referred to as intellectual property, and are covered by their own set of national and international laws.

several decades,[4] as has been shown by the proliferation of multinational trading organizations such as the European Community (EC)[5] and by free trade areas created by agreements such as the Canadian Free Trade Agreement (CFTA)[6] and the North American Free Trade Agreement (NAFTA).[7] The increasing incidence of international trading areas and organizations indicates that trade protectionism is on the decline as the interdependence of nations increases.[8]

The concept of free trade focuses on the reduction of trade barriers.[9] Actions by a state which restrict the flow of goods or services infringe on free trade. One of the more transparent restrictions of trade is a cultural exclusion, also known as a cultural exemption. Cultural exclusions, which exist in virtually all trading agreements, allow a state to limit the trade of goods and services involving that state's culture.[10] Cultural exclusions severely limit or even prohibit cultural industries from competing in a free trade area.[11] Although no trade agreement refers to them as such, cultural industries are essentially synonymous with copyright industries, which are defined as industries that produce copyrighted goods or provide copyrighted services.[12] Some trade agreements seem to encourage the free trade of copyrighted goods through provisions increasing copyright protections for creative works. The holders of the copyright will therefore be inclined to introduce their creative works into the market. Cultural exclusions, however, severely diminish the effect of

4. *See* EDWARD SLAVKO YAMBRUSIC, TRADE BASED APPROACHES TO THE PROTECTION OF INTELLECTUAL PROPERTY 1 (1991).

5. The European Community is a supranational legal entity which encourages international trade among its twelve members and between its members and third countries. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 3.

6. United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-499, 102 Stat. 1851 (1988) [hereinafter CFTA].

7. North America Free Trade Agreement, Nov. 17, 1993, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

8. HAROLD CROOKELL, CANADIAN-AMERICAN TRADE AND INVESTMENT UNDER THE FREE TRADE AGREEMENT 9-10 (1990).

9. *Id.* at 10 (stating that globalization is necessary to compete successfully in the 1990s); *see* JAY DRATLER, JR., INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY ch. 1, at 100 (1993).

10. CFTA, *supra* note 6, art. 2012.

11. JUDITH H. BELLO & ALAN F. HOLMER, GUIDE TO THE U.S.-CANADIAN FREE TRADE AGREEMENT 863 (1992).

12. *Id.*; *see infra* notes 28-41 and accompanying text (discussing copyright industries).

these provisions by restricting the entry of many copyrighted works into the international marketplace.[13]

While existing international conventions have increased copyright protections against illegitimate use of a copyright holder's creative work, further changes are needed in international copyright law.[14] Not only does the changed international economic climate warrant a new perspective on international copyright protection, but the potential for misuse of cultural exclusions by states concerned only with their economic interests (to the detriment of free trade) suggests that copyrighted goods and services be treated in the same manner as other goods and services in the international market. While international conventions are essential to defining the extent of copyright protections, works introduced into the market should be free from government restrictions based merely on their classification as a product of a cultural industry.

This Note analyzes whether a state's cultural concerns justify special treatment of copyrighted goods and services in a world economy which emphasizes free trade. Part II sets forth the theories of copyright, and examines the importance of copyright industries to states. In addition, Part II explores the basic free trade agreements which give rise to common markets and free trade areas. Part III focuses on the trade and protection of copyrighted goods and services in North America under international copyright conventions, the General Agreement on Tariffs and Trade (GATT),[15] and the cultural exclusions in CFTA and NAFTA. The European Community system is discussed in Part IV, including a review of trade and protection of copyrighted goods under copyright conventions, GATT provisions, and cultural exclusions in the Treaty of Rome. In conclusion, Part V looks at the policy implications of current laws and provides proposals for future action.

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13. *See Draft Final Text of the Results of the Uruquay Round of Multilateral Trade Negotiation: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 98-112 (1992) [hereinafter *Hearings*] (statement of Eric H. Smith, Executive Director and General Counsel, International Intellectual Property Alliance).

14. VINCENT PORTER, BEYOND THE BERNE CONVENTION 100 (1991); DRATLER, *supra* note 9, ch. 1, at 102.

15. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

II. FUNDAMENTALS OF COPYRIGHT AND FREE TRADE AREAS

A. Copyright

Copyright in the United States is a property right held by an author or creator in the created item.[16] The laws of the United States limit copyright to an economic right in the work, while the laws of other countries provide an author with both economic and moral rights.[17] Economic rights enable an author to prohibit the work from being copied; moral rights grant an author title to the work and prevent any alteration of the work.[18]

Two different theories support the concept of copyright in the United States.[19] One theory views copyright as a monopoly but accepts the evils associated with a monopoly because of the ensuing benefit to the public.[20] Monopolies are generally considered undesirable because they raise consumer prices and limit market availability of goods.[21] However, the only way the public will be able to enjoy copyrighted goods or services is if the author can afford to produce such works; by allowing the author to claim an economic monopoly for a limited amount of time,[22] the government encourag-

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16. Margaret Luke, *The Author's Expression: The Necessity for U.S. Protection Through Statute and Multilateral Treaty,* 9 SYRACUSE J. INT'L L. & COM. 137, 138 (1982).

17. *Id.*; *see generally* STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY *passim* (1938) (discussing the scope of international copyright).

18. *Luke, supra* note 16, at 137; *see also* Berne Convention for the Protection of Literary and Artistic Works of Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, revised at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries), revised at Paris on July 24, 1971, and amended on Oct. 2, 1979, arts. 2, 6bis, 7, 11bis, 12, 828 U.N.T.S. 221 [hereinafter Berne]. States may be subject to slightly different provisions of Berne depending on which version the state has adopted.

19. Abrams, *supra* note 1, at 1120.

20. *Id.* at 1120-21. This is also the rationale adopted by the European Community. *See generally* Adolf Dietz, *Commentary, in* COPYRIGHT IN FREE AND COMPETITIVE MARKETS 49, 49-56 (W.R. Cornish et al. eds., 1986) (discussing the harmonizing effects of the standardization of European Community copyright law).

21. Abrams, *supra* note 1, at 1120-21.

22. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS 11 (1989) [hereinafter OECD]. Different countries allow for different periods of copyright protection. *See* Julian Turton, *Introduction, in* NEIGHBOURING RIGHTS: ARTISTS, PRODUCERS AND THEIR COLLECTING SOCIETIES 12, 15 (Julian Turton & Cees van Rij eds., 1990). This variance in protection has led copyright industries to push for global adherence to a number of comprehensive international copyright conventions. *See infra* notes 55-56, 62-68, 72-79 and accompanying text.

es creativity.[23] It might be argued that if the societal costs of a monopoly outweigh the public benefits derived from conferring monopolies, then it would be appropriate to revise current copyright provisions from a monopolistic to a free market approach.

The second theory supporting the concept of copyright associates copyright with an inherent property right vested in the author, which then gives him or her the exclusive right to determine the uses of, and receive the economic gains from, the work.[24] Thus, the protection of an author's rights in the creative work is primary to this theory of copyright, and any incentive to create is only secondary.[25] However, critics of this theory note that the creation of legally enforceable rights does not give rise to economically enforceable rights or any sort of market power because "[p]roperty rights generally create exclusivity but market power stems from the nature of the demand for the property."[26] In addition, this second theory may effectively prevent copyright infringements, while still stifling international trade. For example, each state determines the scope of copyright protection through its domestic laws. If the domestic law of an importing state does not provide sufficient guarantees of copyright protection to a copyright holder, that holder might not allow its goods to be exported to that state. Normally, the decrease in trade would provide the impetus for change in the importing country's domestic laws. However, that change may not occur if illegal producers of copyrighted goods, often called pirates, provide those goods to the domestic market.[27]

1. *Copyright Industries.* Although the core definition of copyright is straightforward, the outer limits of copyright vary from state to state.[28] A listing of copyright protections, therefore, does not provide a consistent point upon which to analyze copyright laws. Instead, an analysis of copyright industries may be more useful. Some experts have identified four groups which are particularly affected by

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23. *See* NEIL BOORSTYN, COPYRIGHT LAW 3 (1981); *see also* OECD, *supra* note 22, at 11.
24. DRATLER, *supra* note 9, ch. 1, at 78.
25. Abrams, *supra* note 1, at 1122.
26. OECD, *supra* note 22, at 16.
27. *See also* Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action, COM(88)172 final, ch. 2 [hereinafter Green Paper] (discussing piracy); *see generally* OECD, *supra* note 22, at 20-21 (discussing risks to competition)
28. Turton, *supra* note 22, at 13-15; *see also infra* notes 52-53, 149. Sometimes the phrase "neighboring rights" is used to describe rights related to those of traditional copyright, such as the rights of performers and phonographic companies. Turton, *supra* note 22, at 13.

copyright laws: (1) core copyright industries, which primarily produce copyrighted goods;[29] (2) partial copyright industries, which produce goods or services that contain copyrighted elements;[30] (3) distribution industries, which handle the distribution of copyrighted goods to consumers and businesses;[31] and (4) copyright-related industries, which both produce and distribute items that are then used in conjunction with copyrighted goods.[32] Traditional analyses of copyright generally refer only to core industries.[33] However, copyright laws which impact the creation and further production of copyrighted works affect the other three groups of cultural industries as well, thus multiplying the economic effect of such laws.[34]

Copyright industries are of increasing importance to the United States and to the world.[35] Between 1977 and 1990 United States copyright industries had a higher growth rate than the remainder of the economy, resulting in a 6.2 percent compounded annual growth rate compared to a national compounded annual growth rate of 2.4

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29. Materials produced by core copyright industries include newspapers, periodicals, books and related items, motion pictures, theatrical productions, advertising items, computer software, and data processing items. STEPHEN E. SIWEK & HAROLD FURCHTGOTT-ROTH, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: 1977-1990, at 3 (1992).

30. Partial copyright industries include those which produce such disparate items as fabric and architecture; these products are not generally perceived as being composed exclusively of copyrightable material. *See id.*

31. Distribution industries such as transportation services and retail trade are impacted by copyright laws but do not include copyrighted material *per se*. *See id.* at 3-4.

32. Items which are related to copyright industries include televisions, computers, and other recording and listening devices. *Id.* at 4.

33. In this Note, the term "copyright industries" will refer to core copyright industries unless specifically stated otherwise.

34. *See also* MEHEROO JUSSAWALLA, THE ECONOMICS OF INTELLECTUAL PROPERTY IN A WORLD WITHOUT FRONTIERS: A STUDY OF COMPUTER SOFTWARE 45 (1992) (listing factors such as export losses, sales never made, sales lost relative to previous sales, future export sales put at risk, loss in domestic sales due to imported goods, loss of revenues from unpaid royalties, reduced profit margins, unrecovered research costs, and the enforced reduction of production equipment, which cause intellectual property infringement and global economic losses).

35. The United States is the world's leading exporter of copyrighted works. Heather Dembert, Note, *Securing Authors' Rights In Satellite Transmissions: U.S. Efforts to Extend Copyright Protection Abroad*, 24 COLUM. J. TRANSNAT'L L. 73, 78 n.28 (1985); *see also* Nancy R. Weisberg, Note, *Canadian Signal Piracy Revisited in Light of United States Ratification of the Free Trade Agreement and the Berne Convention: Is This a Blueprint for Global Intellectual Property Protection?*, 16 SYRACUSE J. INT'L L. & COM. 169, 169 (1989). The United States's dominant market share could increase if international copyright protections were increased. Dembert, *supra*, at 78. Copyright violations cost American companies approximately $1.5 billion annually, and neither negotiation, retaliation, deterrent technology, nor international conventions have successfully stopped those violations. Weisberg, *supra*, at 169.

percent.[36] Even during the recessionary years of the late 1980s, copyright industries managed to chart a 5.0 percent compounded annual growth rate.[37] Copyright industries in the United States are now larger than a number of other industries, including the agricultural, forestry, and fisheries industries combined, and employ more workers than any other manufacturing sector of the United States economy.[38] In addition, copyright industries have a favorable impact on United States foreign trade, and one estimate of foreign sales of copyrighted goods for 1990 is in excess of $34 billion.[39] For some copyright industries, foreign markets represent a significant source of revenue.[40] The positive impact on the United States economy is only one example of the importance of copyright industries.[41] Indeed, international trade in copyrighted goods is growing on a global level.

B. Free Trade Areas

The current globalization of the marketplace has increased the need for international trade agreements.[42] The two most important types of modern trade agreements create either a common market or a free trade area.[43] Although both foster free trade among their members, each has its own distinct characteristics.

One of the two types of agreements creates a common market, also known as a customs union. A common market combines political as well as economic objectives in an attempt to compete on the world market.[44] States within the common market eliminate essentially all internal tariff barriers and coordinate their external policies to create

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36. SIWEK & FURCHTGOTT-ROTH, *supra* note 29, at 7.

37. *Id.*

38. *Id.* at 7-8.

39. *Id.* at 9.

40. The motion picture industry derives 30 to 40 percent of a film's total revenue from foreign markets. Dembert, *supra* note 35, at 80. Foreign copyright infringements also adversely affect licensing arrangements and broadcast rights, resulting in lost profits for copyright holders. *Id.*

41. The European Community is also a major developer of copyright and industrial designs, and has recognized that trade in these areas is of "growing economic importance." *See* Green Paper, *supra* note 27, at 10-12.

42. *See generally* CROOKELL, *supra* note 8, at 10 (viewing the global strategies of Japanese businesses and the emergence of Eastern Europe as a rejection of isolationism and a trend toward globalization of the world economy).

43. *Id.* at 19-20.

44. D. LASOK & J.W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 385-86 (4th ed. 1987).

a uniform tariff policy for goods coming from countries that are not within the common market.[45] In effect, an individual state surrenders some of its sovereign power to regulate trade across its borders by conforming to the trade policies of the common market.[46] Harmonization of trade regulation is the hallmark of this type of trade agreement.[47] The EC is an example of an existing common market.[48]

The second type of modern trade agreement creates a free trade area.[49] States which are members of a free trade area have the same economic goals as members of a common market, such as efficient access to a larger market; a free trade area, however, fulfills these goals primarily through economic means.[50] Member states' domestic markets maintain their own distinct tariffs and regulations on nonmembers' imported goods, but the provisions of the agreement typically ensure easy access to a member state's market for trade and investment activities by other member states.[51] The key provision in a free trade area agreement is the national treatment requirement. National treatment requires each state to subject imported goods to the same regulations which apply to domestically produced goods.[52] Services and capital investment firms may also be subject to national treatment provisions.[53] National treatment thus prevents discriminatory regulation of goods in the free trade area based on country of

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45. CROOKELL, *supra* note 8, at 21-22.

46. *See* LASOK & BRIDGE, *supra* note 44, at 33.

47. *See* DERRICK WYATT & ALAN DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 21 (1987).

48. CROOKELL, *supra* note 8, at 21.

49. *See id.* at 19.

50. *See* Murray G. Smith, *What is at Stake?*, *in* BILATERALISM, MULTILATERALISM AND CANADA IN U.S. TRADE POLICY 69, 88-89 (William Diebold, Jr., ed., 1988).

51. CROOKELL, *supra* note 8, at 28-29.

52. *Id.* at 22. National treatment does not necessarily create a profitable trading environment for foreign companies; it merely prohibits discriminatory treatment. When discussing copyright issues, national treatment should not be confused with the concept of reciprocity. For instance, reciprocity means that country A will protect country B's works to the same extent as country B protects its own works. *See* DRATLER, *supra* note 9, ch. 1, at 100. National treatment means country A extends its own protections to works from country B. CROOKELL, *supra* note 8, at 22.

53. *See* NAFTA, *supra* note 7, art. 1407; CFTA, *supra* note 6, art. 1602. However, internal regulations concerning such areas as safety, transportation, and other domestic matters are still under the control of each individual nation. This is true even if the regulations affect the other parties' goods and firms, so long as the regulations do not discriminate against the other nation's goods or firms. CROOKELL, *supra* note 8, at 20.

origin of the goods.[54] Two examples of free trade areas which apply national treatment provisions are CFTA and NAFTA.[55] Although not a free trade area *per se*, GATT also contains national treatment provisions,[56] thereby improving accessibility to the markets of participating countries.

Free trade areas and common markets help their member states to compete in the world market.[57] At present, the EC's common market approach is unique, while there has been a proliferation of free trade area agreements.[58] If copyright industries are to benefit from the larger markets created by free trade agreements, provisions in these agreements concerning copyrighted goods and services must work with, and not against, the goal of free trade.

III. COPYRIGHT AND FREE TRADE IN NORTH AMERICA

A. Copyright Under International Copyright Conventions

International copyright conventions were developed to address the unique concerns of copyright holders whose creative works enter into the international stream of commerce.[59] International copyright conventions developed almost concurrently with domestic laws on copyright as national governments recognized the need for international copyright protection.[60] There are a number of conventions which address specific areas of concern to copyright holders.[61] In general, however, the most important conventions are the Berne Convention (Berne)[62] and the Universal Copyright Convention (UCC).[63] These two conventions define copyright protection for an

54. *See* GATT, *supra* note 15, art. III.

55. Other free trade agreements which have been negotiated in compliance with GATT standards include the 1960 European Free-Trade Area, the 1965 U.K.-Ireland Free-Trade Agreement, the 1983 Australia-New Zealand Closer Economic Relations Agreement, and the 1986 United States-Israel Agreement. CROOKELL, *supra* note 8, at 19.

56. GATT, *supra* note 15, art. III.

57. CROOKELL, *supra* note 8, at 10.

58. *Id.* at 10-11.

59. DRATLER, *supra* note 9, ch. 1, at 3, 87.

60. NORDEMANN ET AL., *supra* note 3, at 4.

61. *See generally id.* at 4-11 (listing some of the more important conventions).

62. Berne, *supra* note 18.

63. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, revised in Paris July 24, 1971, 25 U.S.T. 1343 [hereinafter UCC]. As the UCC was designed to coexist with Berne, their provisions do not conflict. BOORSTYN, *supra* note 23, at 331.

author's creative works, and outline a state's treatment of foreign copyrights.[64] Most copyright conventions are based on the concept of national treatment, although some conventions contain provisions which grant minimum rights to foreign copyright holders even if domestic copyright holders do not have full use of those rights.[65] A state may make an express reservation to the conventions, but these reservations may only concern minimum rights directly granted by the convention.[66]

International copyright conventions have provided an important first step in protecting copyright holders from international infringements on copyright. However, a number of states are still not parties to any international copyright convention. Furthermore, some states which are parties to a copyright convention do not or cannot enforce the domestic application of the conventions.[67] In addition, numerous revisions of the primary conventions have created a patchwork of copyright protection, both in substantive text and in practice by state parties.[68] The net result is inadequate protection for copyright holders, as well as a hesitancy by copyright industries to move their goods into states which do not provide sufficient enforcement of international copyright convention provisions.

North American countries have exhibited relatively strong participation in international copyright conventions. The United States, Canada, and Mexico are all members of Berne as well as of the UCC.[69] However, because the conventions only cover traditional copyrights and not necessarily all neighboring rights,[70] these conventions may be inadequate. Some copyright industries have even complained that copyright infringements have occurred in North America.[71]

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64. *See* NORDEMANN ET AL., *supra* note 3, at 4, 6-8.

65. DRATLER, *supra* note 9, ch. 1, at 96, 100.

66. NORDEMANN ET AL., *supra* note 3, at 18.

67. *Id.* at 31-32. Nonenforcement carries a large price tag for copyright holders, particularly American cultural industries which dominate the world market. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, COPYRIGHT PIRACY IN LATIN AMERICA 11 (1992). For example, in 1991 United States copyright industries lost over $660 million in revenue due to piracy in sixteen Central and South American countries. *Id.*

68. NORDEMANN ET AL., *supra* note 3, at 32-33.

69. *See generally id.* at 672-86 (listing copyright relations between the United States and other countries).

70. *See* PORTER, *supra* note 14, at 14-15; *see also* Turton, *supra* note 22, at 13.

71. Dembert, *supra* note 35, at 81 (discussing unauthorized retransmission of satellite programming). However, CFTA has addressed this particular problem. *See* CFTA, *supra* note 6, art. 2006.

B. Copyright Under GATT

GATT creates international obligations among its members concerning the trade of goods.[72] Many copyrighted items are goods, while others, such as broadcast programming, are considered services and therefore are excluded from GATT. The primary goal of GATT is to ensure national treatment of imported goods by the importing country, and to ensure common levels of tariffs for all members of GATT for intra-GATT trade.[73] The process which ensures common levels of tariffs is based on the most favored nation (MFN) principle, which requires a member state to apply the lowest tariff rate set by it to all other member states.[74] The MFN principle may seem to conflict with free trade areas such as CFTA because CFTA provides for significantly lower tariffs on a bilateral level.[75] GATT, however, specifies that the MFN principle need not be applied in a free trade area where the majority of tariffs are "eliminated on substantially all the trade between the constituent territories."[76] NAFTA and CFTA member states claim to fall within the free trade area exception in GATT.

In the last decade the United States has moved to increase protections for intellectual property under GATT.[77] In 1984 the

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72. GATT, *supra* note 15, intro. These obligations are "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." *Id.*

73. *Id.* arts. I-III.

74. *Id.* art. I.

75. Some critics assert that bilateral treaties further fragment an already disjointed world market; others believe bilateral treaties complementing Article XXIV of GATT actually increase international trading. Smith, *supra* note 50, at 87-88.

76. GATT, *supra* note 15, art. XXIV(8)(b); 4 THE EUROPEAN COMMUNITY AND GATT 144 (Meinhard Hilf et al. eds., 1986).

77. Dembert, *supra* note 35, at 74. The United States has not relied solely on international remedies to combat improper trade activities. For example, the United States has often used section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (amended 1975), to exclude imports it views as violative of United States intellectual property rights. Arthur Wineburg, *Examining a Bill on Infringing Imports*, THE NAT'L L.J., Nov. 30, 1992, at 21; *see generally* YAMBRUSIC, *supra* note 4, at 25-29 (outlining the procedural steps used to invoke section 337). The use of section 337 to exclude imports "applied substantive unfair competition and intellectual property laws to the import trade." Wineburg, *supra*, at 21. When a number of GATT member states objected to this use of section 337, the United States sought to revise the section to comply with GATT provisions. *Id.*; *see also ABA Delegates Adopt Resolution Supporting Amendment of Section 337*, 10 INT'L TRADE REP., Aug. 18, 1993, at 1375-76. Contemplated GATT provisions, *see infra* notes 80, 85 and accompanying text, may make a revision of section 337 unnecessary because that type of action by the United States would be permissible under GATT. Wineburg, *supra*, at 21.

GATT definition of commerce was expanded to include "transfers of information" and to allow the President of the United States to retaliate against unfair, unreasonable, or unjustifiable trade practices which affect the trade in intellectual property.[78] This action indicates the reluctance of the United States to rely solely on international conventions for protection of intellectual property (including copyrighted goods), demonstrating instead the use of trade remedies to protect intellectual property rights, including copyright.[79] By using trade remedies as an appropriate means of correcting harmful trade practices instead of copyright conventions, the differentiation between coypright goods and other types of goods in the global market has been narrowed. Protecting copyrighted goods from illegitimate *use* is different than protecting the copyrighted goods from illegitimate *trade.* The use of trade remedies is as appropriate to protect the trade of copyright goods as for any other type of goods.

Although copyrighted goods fall within GATT protections, GATT does permit states to exclude certain items from GATT because of the importance of those items to a state's culture.[80] Most items designated as cultural goods are copyrightable;[81] thus, cultural exclusions from GATT permit potentially unlimited restrictions on the trade of copyrighted goods by member states if the goods are deemed to have "artistic value."[82] Because the United States leads the world in the export of copyrighted goods, it is primarily affected by cultural exclusions. The market for copyrighted goods is growing worldwide, however, so protectionist provisions like cultural exclusions could result in decreased revenue for other states, as well as create trade disincentives and animosity among potential trading partners.[83]

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78. United States Trade Act of 1974, 19 U.S.C. § 2411 (1988); *see also* Dembert, *supra* note 35, at 74.

79. Dembert, *supra* note 35, at 74.

80. *See* GATT, *supra* note 15, art. XX(f) (allowing measures "imposed for the protection of national treasures of artistic . . . value"). In addition, measures may be imposed for the protection of copyrights themselves. *Id.* art. XX(d). However, this seems to be more of a copyright enforcement provision than a cultural exclusion.

81. William Diebold, Jr., *The New Bilateralism?, in* BILATERALISM, MULTILATERALISM AND CANADA IN U.S. TRADE POLICY 128, 133 (William Diebold, Jr., ed., 1988).

82. *See* GATT, *supra* note 15, art. XX.

83. CROOKELL, *supra* note 8, at 9. Some experts feel that a free trade agreement such as NAFTA is an appropriate and effective mechanism by which copyright protection and enforcement standards can be increased. *ABA Meeting Looks at NAFTA and Intellectual Property Rights*, 9 INT'L TRADE REP., Apr. 22, 1992, at 724-25. For example, historically Mexico's intellectual property protections were seen as inadequate, the recent trade discussions coincided with Mexican government actions resulting in a single North American standard of

Cultural exclusions exist in a number of different contexts; for example, cultural exclusions have been prominent in United States-Canada trade relations. Canada has strongly defended the use of cultural exclusions,[84] particularly in trade agreements with the United States, despite the seeming similarity of their cultural histories. One method by which Canada might continue to protect its cultural goods is through Article XIX of GATT.[85] As will be seen later, Canadian copyright industries are having trouble competing with American imports,[86] and Article XIX allows for temporary protection of industries that are "no longer internationally competitive."[87] If Canada avoids designating copyrighted goods as cultural (and therefore exempt from the free trade provisions of GATT), the international community will be better able to analyze the real reasons for Canada's trade practices. In addition, the improvements in Canada's copyright industry can be more easily measured. Furthermore, Article XIX requires the temporary protection to terminate when it is no longer necessary to assist that industry. However, states that apply Article XIX to protect a domestic industry must apply tariffs to competing foreign industries on a MFN basis.[88]

The international community is not ignorant of problems of international trade in intellectual property. Negotiations in the Uruguay Round of GATT are currently underway, and are addressing the gaps in protection and enforcement found in GATT.[89] A special Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires member nations to become signatories to certain copyright conventions, lays out standards of protection for various rights which had been previously undefined or underprotected, and provides for enforcement, dispute resolution, and remedial measures.[90] Copyright industries support much of the proposed TRIPS

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protection. *Id.*

84. *Id.* at 12.

85. Article XIX of GATT permits a state to take emergency action to prevent serious injury to a domestic industry from imports. GATT, *supra* note 15, art. XIX. The emergency action lasts only as long as is necessary to prevent or remedy the injury. *See id.* CFTA's most similar provision is Article 1101. *See* CFTA, *supra* note 6, art. 1101.

86. *See infra* note 114 and accompanying text.

87. *See* Patrizio Merciai, *Safeguard Measures in GATT*, 15 J. WORLD TRADE L. 41, 41 (1981).

88. *See* JOHN W. JACKSON & WILLIAM J. DAVEY, INTERNATIONAL ECONOMIC RELATIONS 595-604 (2d ed. 1986).

89. Dembert, *supra* note 35, at 94.

90. GATT SECRETARIAT, DRAFT FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS Annex III (Dec. 20, 1991).

agreement, but have expressed concern that the level of protection is still insufficient, and that inadequate standards will become damaging precedent.[91]

Another problem is whether the services section of the GATT Services Agreement will include a cultural industries exclusion.[92] Copyright industries which provide services oppose the inclusion of a cultural industries exclusion for the same reasons expressed by those opposed to cultural exclusions in GATT.[93] Presently, there is no definitive target date for the finalization of the Uruguay Round of negotiations, although efforts are being made to complete the Round by the end of 1993.[94]

C. Copyright Under CFTA

The Canadian Free Trade Agreement, signed by Canada and the United States, specifically excludes cultural industries from application of the treaty provisions.[95] That section of the agreement, Article 2005, has been called the "cultural exclusion" or "cultural exemption" provision.[96] Cultural industries have been defined as those involving the publication, distribution, or sale of books, magazines, periodicals or newspapers, film or video recordings, audio or video music recordings, and music in print.[97] Direct transmission of radio and all radio, television, and cable broadcasting services, as well as satellite programming and network broadcast services, are also included in the

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Although the United States has indicated that it may want to renegotiate some elements covered by the draft's final act, GATT Director-General Peter Sutherland has stated that he will make only minor revisions to the document. *Focus Shifts on Uruguay Round Talks to Foreign Capitals During August*, DAILY REP. FOR EXECUTIVES, Aug. 2, 1993, *available in* LEXIS, Nexis Library, DREXEC File.

91. *Hearings*, *supra* note 13, at 2-3; *see also* C. Michael Hathaway, *The Earth Summit: Was the United States Right Not to Sign the Biodiversity Convention? Yes: A Threat to Property Rights*, A.B.A. J., Sept. 1992, at 42.

92. *Hearings*, *supra* note 13, at 4.

93. *See id.* at 4-5.

94. *EC Pushes to Conclude Uruguay Round*, BUS. EUROPE, Aug. 2, 1993, *available in* LEXIS, Nexis Library, CURRNT File.

95. CFTA, *supra* note 6, art. 2005.

96. The only aspects of international trade that are not affected by the cultural exclusion are tariff elimination (art. 401), mandatory divestiture of indirect acquisitions (art. 1607), retransmission rights (art. 2006), and the repeal of the requirement that publishers print in Canada to be eligible for certain tax deductions (art. 2007). *See* CFTA, *supra* note 6, art. 2005(1); *see also* David Leyton-Brown, *Continental Harmonization and the Canada-U.S. Free Trade Agreements*, *in* THE NATION-STATE VERSUS CONTINENTAL INTEGRATION 149, 159 (Leslie A. Pal & Rainer-Olaf Schultze eds., 1991).

97. CFTA, *supra* note 6, art. 2012.

cultural industries exclusion.[98] As in most trade agreements, the terms "cultural industry" and "copyright industry" are virtually synonymous.[99]

Cultural exclusions are promoted by states as a means of protecting their cultural integrity. In the case of Canada, many Canadian citizens feel very strongly that their culture is distinct from the culture of the United States and thus deserves recognition on its own merits.[100] To Canadians cultural exclusions prevent an amalgamation of American and Canadian culture. However, the fact that Canada is the largest single importer of American intellectual property[101] reflects the potential blurring of American and Canadian cultural boundaries.

The Canadian government has made the protection of Canadian culture and cultural industries a priority, with the creation and maintenance of the Canadian Broadcasting Corporation (CBC) as the most visible sign of that social policy.[102] Television has also been the battlefield for a number of conflicts between the United States and Canada regarding programming and satellite transmissions,[103] and as such is a prime example of the cultural exclusion at work.

The Canadian government uses the CBC as a means to promote uniquely Canadian values through various production subsidies and programming restrictions.[104] However, the Canadian viewing public has clamored for American television programs,[105] threatening the viability of Canadian programs. As the popularity of television viewing in Canadian daily life has increased, there has been a

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98. *Id.*

99. Computer software is the only copyright industry not included under the cultural exemption.

100. David Taras, *Defending the Cultural Frontier: Canadian Television and Continental Integration*, *in* THE NATION-STATE VERSUS CONTINENTAL INTEGRATION, *supra* note 96, at 335, 335.

101. Weisberg, *supra* note 35, at 181. The large number of American publications available in Canada may be due to efforts by American industries to use the back-door provision of the Berne Convention prior to the United States's accession to that convention. *See* MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 17.04(D) (1993); *see also* Luke, *supra* note 16, at 151-523. Using the back-door provision means that American industries would simultaneously publish in Canada and the United States in order to qualify for international protection under Berne.

102. Leyton-Brown, *supra* note 96, at 155.

103. Weisberg, *supra* note 35, at 170.

104. *See generally* Leyton-Brown, *supra* note 96, at 155 ("[T]he Canadian Broadcasting Corporation was created to be the nation-building carrier of Canadian cultural material to the Candian public.").

105. *See* Weisberg, *supra* note 35, at 179 n.81. In fact, the vast majority of all cultural products are imported. *Id.*

corresponding increase in American influences in spite of government subsidies of Canadian television.[106] Some observers believe that vital information about Canadian cultural and political issues may no longer be available to segments of the Canadian public due to the predominance of American television programming.[107]

Cultural promotion aside, the protection of Canadian broadcasting does not make economic sense. Even with the Canadian Production Development Fund subsidizing Canadian production companies, the CBC can barely compete with programs imported from the United States.[108] The requirement that CBC productions reflect Canadian values also limits the marketability of Canadian productions in the world market.[109] One way to increase marketability is to lift CFTA's ban on American investment in Canadian television, thus increasing the ability of Canadian companies to compete in the world market by introducing American capital and production techniques, as well as American creative influences, into Canadian television production. Even with American investment, Canadian productions need not imitate American productions to be profitable and increase their appeal; Canadian productions can still retain their Canadian influences but would have the opportunity to be shown to larger audiences.

To counter the use by Canada of the cultural exclusion, the United States may be able to invoke Article 2005(2) of CFTA. Article 2005(2) allows the United States to retaliate against an unpopular use of the cultural exclusion by taking measures that have an equivalent commercial effect, even though those measures may not necessarily relate to any cultural industries.[110] Article 2005(2) may, however, work negatively in that it may limit the scope of the United

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106. Taras, *supra* note 100, at 337-38 (noting decreases in government funding for Canadian television). Subsidies granted by the Canadian government include various tax incentives to promote Canadian television. Weisberg, *supra* note 35, at 177. However, such incentives have not necessarily succeeded in revitalizing the industry. *Id.* at 179. During discussions of CFTA, the Canadian government relented on a few matters, but for the most part refused to negotiate on issues dealing with cultural industries. *Id.* at 182-83.

107. Taras, *supra* note 100, at 336-37.

108. *Id.* at 340; *see also* Leyton-Brown, *supra* note 96, at 155. With American programming in effect subsidizing the Canadian cable industry, the question has become less one of culture than one of pure economics. Weisberg, *supra* note 35, at 180. Although some critics have classified Canada as a developing cultural nation, and thus excuse its protectionist stance, that position does not seem to correlate with Canada's cultural import history. *Id.*; *see* CFTA, *supra* note 6, art. 2006 (outlining basic treatment by the treaty).

109. Taras, *supra* note 100, at 344.

110. Leyton-Brown, *supra* note 96, at 159.

States's retaliatory options to those having an equivalent commercial effect, thereby excluding certain types of trade wars.[111] The practical effect of the article has not been tested because Canada has not yet claimed any exclusions under Article 2005.[112]

CFTA's cultural exclusion may seem attractive in the short run, but the long-term effects could harm the Canadian economy and cultural industries as well as the economy and industries of the United States. In the near future, the Canadian government could continue to subsidize what is seen as a struggling domestic industry,[113] thus protecting Canadian culture. Eventually, however, Canadian cultural industries will become less competitive on the global market and will continue to lose their audience members to readily available American books, movies, and television shows. Government assistance, such as subsidies, will not make Canadian cultural industries more competitive, and will not result in the kind of cultural protection that is envisaged by the exclusion, namely the increased availability and production of culturally significant goods and services. Because the cultural exculsion cannot effectuate either of its goals, it appears to be disguised restraint of trade used to protect Canada's cultural industries for economic, not cultural, reasons.[114]

American copyright industries will also be adversely affected by the cultural exclusion provision because it will be used as precedent in other trade agreements.[115] CFTA is being scrutinized as a model for future free trade agreements; terms of an agreement between the United States and Canada, two of the world's closest trading partners, will establish the standard for other free trade agreements.[116] As

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111. *Id.*

112. BELLO & HOLMER, *supra* note 11, at 877.

113. Several trade agreements allow for short-term protection of struggling domestic industries. GATT, *supra* note 15, art. XX; EEC TREATY art. 115.

114. Canadian cultural industries generate more than $10 billion (U.S.) in revenue and employ over 300,000 workers. Weisberg, *supra* note 35, at 179. In addition, Canadian cable companies initially resisted paying royalties generated by retransmission of television programming to American copyright holders not because of cultural concerns, but because an estimated 75 percent of the money generated would go to American, not Canadian, broadcasters. Therese Goulet, *The Canada-U.S. Free Trade Agreement and the Retransmission of American Broadcasts in Canada*, 24 GONZ. L. REV. 351, 358 (1988-89).

115. In the course of negotiating a free trade agreement, a government will target certain business sectors to receive more benefits than others. In the case of CFTA, tobacco, beverages, and textiles were among the American industries that benefitted from favorable treatment in the agreement, while copyright industries, due in large part to the cultural exclusion, were among the industries that lost business opportunities. *See* LENORE SEK, U.S.-CANADA FREE-TRADE AGREEMENT: STATES AFFECTED BY MAJOR PROVISIONS (C.R.S. May 3, 1988).

116. *See* CROOKELL, *supra* note 8, at 14-15; Diebold, *supra* note 81, at 146.

mentioned above, United States copyright industries are attempting to have the cultural exclusion in GATT deleted;[117] this effort would be easier if the United States could point to CFTA as a model free trade agreement. As it is, unfortunate precedent has been set in favor of continuing cultural exclusions.

An additional effect of the cultural exclusion on American industries is in the form of income lost because of inaccessibility of markets. American copyright industries are profitable and important to the national economy.[118] The United States government thus should negotiate trade provisions which foster trade in copyright industries. As the world's leading producer of copyrighted goods, and as one of the world's most influential trading powers, the United States has both the need and the ability to promote positive trade provisions.

D. Copyright Under NAFTA

The North American Free Trade Agreement incorporates the same cultural exclusion between that was seen Canada and the United States in CFTA in trade relations between Canada and Mexico.[119] NAFTA in essence has duplicated the cultural exclusion provision of CFTA.[120] Unlike CFTA, however, trade between Mexico and the United States is free of cultural exclusions.[121] While Mexico does not currently represent as large a market for American goods as Canada, Mexico does rely heavily on the United States for trade,[122]

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117. *Hearings*, *supra* note 13, at 4-5.

118. *See* Weisberg, *supra* note 35, at 169 (noting that the United States is the world's largest exporter of intellectual property and creates a trade surplus of $1.5 billion annually).

119. *See* NAFTA, *supra* note 7, annex 2106.

120. *Id.* Although NAFTA was signed by the heads of state of the three participatory countries, President Bill Clinton indicated that he would like to negotiate supplementary agreements which may affect the intellectual property provisions. Keith Bradsher, *Trade Pact Signed in 3 Capitals But Accord Faces Uncertain Future*, N.Y. TIMES, Dec. 18, 1992, at C1. Supplementary side agreements have been negotiated between the three countries and may have helped break the logjam on NAFTA's ratification process. *See Free Trade Accord Gets Back on Track*, ST. LOUIS POST-DISPATCH, Aug. 14, 1993, at 1A.

121. NAFTA, *supra* note 7, annex 2106.

122. Direct investment figures are one way of demonstrating the relative importance of trade between two countries. For example, American investment represents approximately 70 percent of the total foreign investment in Mexico and 10 percent of America's total foreign direct investment. Gerardo M. Bueno, *A Mexican View*, *in* BILATERALISM, MULTILATERALISM AND CANADA IN U.S. TRADE POLICY, *supra* note 50, at 105, 123. Canadian investment in Mexico represents only 7 percent of foreign investment in Mexico. *Id.*

and there is enormous potential for growth.[123] Economic opportunities are increasing therefore for both the United States, which gains easier access to Mexican consumers, and for Mexico, which gains access to the large Hispanic population in the United States. In fact, the absence of a cultural exclusion will allow Mexican copyright industries to target the Hispanic population which is often ignored by, or even currently closed to,[124] mainstream United States industries, resulting in a potential tidal wave of cultural trade. In addition, once United States industries see the profit-making potential from this largely untapped market, they will begin to target more products to that market, products which will be exportable to Mexico and South and Central America. This type of trade expansion benefits both states and is the result that free trade agreements are intended to produce; it would not be possible, however, under a trade agreement containing a cultural exclusion provision.

The impact of NAFTA's cultural exclusion on trade between Canada and Mexico is unclear. To some extent, the cultural exclusion may have less impact than in United States-Canada relations because Mexico and Canada do not share a common language or a common cultural background. Cultural similarities are not the only impetus for trade, however; sometimes cultural differences may promote a greater volume of trade due to the perception that imported goods are rare or exotic. Since cultural amalgamation was not a concern, the inclusion of the cultural exclusion provision in NAFTA may have been prompted by Canada's desire to achieve consistency between NAFTA and CFTA, or by a desire to emphasize its concern about protecting Canadian culture.

IV. COPYRIGHT AND FREE TRADE IN THE EUROPEAN COMMUNITY

A. Copyright under International Copyright Conventions

Many of the same copyright conventions to which Canada, the United States, and Mexico are parties have also been signed by

123. Lee H. Hamilton, *NAFTA: Whose Interests Would be Served? U.S. Economy, Foreign Policy Will Benefit*, CHI. TRIB., Aug. 19, 1993, at 23.

124. Preservation of cultural identity has been a concern of Mexico, but the loosening of intellectual property regulations is a condition of the trade agreement. *See generally* Bueno, *supra* note 122, at 124 (noting that disputes between Mexico and the United States over the regulation by Mexico of radio and television programs from the United States are not covered under a Mexican claim of "preservation of cultural identity," as is claimed by Canada).

member states of the European Community (EC).[125] Indeed, the EC is committed to increasing copyright protection within the Community and will, on occasion, instruct member states which have not acceded to certain conventions to do so.[126] In addition, the EC will stipulate that nonmember states sign copyright conventions as part of other treaty ratifications, thereby further promoting copyright protection for EC copyright holders in the international market.[127]

International copyright conventions have led to the harmonization of sometimes conflicting national copyright laws, thus achieving a more unified approach to the regulation of the trade of copyrighted goods and raising the general level of protection for copyright holders within EC member states.[128] For example, it was the Rome Convention[129] that spurred the harmonization of the disparate legal traditions of the economically oriented Anglo-Saxon copyright system and the more artistically principled *droit d'auteur*, which is of French origin.[130] In general, convention provisions are effective only when the conventions are either self-executing or when they have been adopted by domestic legislation.[131] Even when the conventions have domestic effect, the extent of harmonization is limited by the principle of national treatment, which relies on the domestic law of the importing country to supply the appropriate legal norms.[132] Harmonization is also limited to those areas specifically allocated to EC

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125. For example, all members of the European Community are parties to both Berne and the UCC. *See* NORDEMANN ET AL., *supra* note 3, at 505-56.

126. Council Resolution of 14 May 1992 on Increased Protection for Copyright and Neighbouring Rights, 1992 O.J. (C 138) 1, 1 [hereinafter Council Resolution].

127. *Id.*

128. GILLIAN DAVIES & HANS HUGO VON RAUSCHER AUF WEEG, CHALLENGES TO COPYRIGHT AND RELATED RIGHTS IN THE EUROPEAN COMMUNITY 52 (1983); *see also* Council Directive 92/100 of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 1992 O.J. (L 346) 61, 61 [hereinafter Related Rights Directive]; Council Directive 89/552 of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Rights, 1989 O.J. (L 298) 23, 24.

129. This convention, formally known as the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, was signed October 26, 1961, 496 U.N.T.S. 43. NORDEMANN ET AL., *supra* note 3, at 337-433.

130. DAVIES & VON RAUSCHER AUF WEEG, *supra* note 128, at 52.

131. *Id.*

132. *Id.*; *see supra* note 52 and accompanying text (discussing national treatment); *see infra* note 139 (discussing the effect of national treatment on copyright laws).

control, although some critics support complete harmonization even in areas not yet covered by the copyright conventions.[133]

Presently, international copyright conventions have a somewhat limited effect in the EC, despite the fact that the Berne Convention and the UCC were signed by a number of EC member states prior to the creation of the EC.[134] The European Court of Justice (ECJ) has construed Article 234 of the Treaty of Rome to mean that "the rights and obligations arising from agreements concluded before the entry into force of this treaty between one or more Member States . . . shall not be affected by the provisions of this treaty."[135] Therefore, the UCC and Berne apply to EC member states' relations with third countries, but the two conventions apply to intra-Community trade only to the extent that their provisions do not conflict with EC principles.[136] As for conventions adopted after the creation of the EC, the Treaty of Rome allows and encourages such measures if they increase the harmonization and mutual reciprocity of rights of EC nationals.[137] Although the EC supports member states' adherence to copyright conventions, it has not yet created a European law of copyright.[138] Instead, the EC generally defers to domestic copyright laws regarding such matters as copyright application procedures and included rights.[139]

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133. DAVIES & VON RAUSCHER AUF WEEG, *supra* note 128, at 52.

134. *Id.* at 54.

135. Joined Cases 21-24/72, International Fruit Co. v. Produktschap voor Groenten en Fruit, 1972 E.C.R. 1219, 1236, 2 C.M.L.R. 1, 14 (1975); *see also* DAVIES & VON RAUSCHER AUF WEEG, *supra* note 128, at 54-55.

136. DAVIES & VON RAUSCHER AUF WEEG, *supra* note 128, at 54-55. At least one recent directive has required member states to comply with the term of protection designated by Berne. *See* Related Rights Directive, *supra* note 128, art. 11.

137. DAVIES & VON RAUSCHER AUF WEEG, *supra* note 128, at 55; *see also* EEC TREATY art. 220; *see generally* Green Paper, *supra* note 27, at 12-13 (describing the need for copyright protection to be extended uniformly across the EC).

138. Although the EC has not moved to create a Community copyright law, the EC has the legal power to do so if uniform internal regulations are necessary to facilitate intra-Community trade. It is therefore easier for the Community to lead the way in abolishing national copyright laws, since as a customs union it has more power to harmonize internal regulations than do parties to other types of free trade agreements. *See infra* notes 142-45 and accompanying text (concerning the political aspects of a customs union).

139. Cees van Rij, *The Road to 1992: Some Aspects of EC Law*, *in* NEIGHBORING RIGHTS: ARTISTS, PRODUCERS AND THEIR COLLECTING SOCIETIES, *supra* note 23, at 33-37. "[D]etermination of the conditions and procedures under which protection of [copyright] is granted is a matter for national rules." Case 144/81, Nancy Kean Gifts B.V. v. Keurkoop B.V., 1982 E.C.R. 2853, 2871, 2 C.M.L.R. 47, 82. A comparison of copyright laws in the different member states shows how diverse their laws can be. *See* ERNST-JOACHIM MESTMACKER, COPYRIGHT IN COMMUNITY LAW 18-26 (1976).

B. Copyright Under GATT

All of the EC member states were signatories to GATT prior to the creation of the European Community.[140] Soon after the creation of the EC, member states signed a protocol declaring that the provisions of GATT were binding not only upon the individual member states, but upon the EC as well.[141]

The EC has been designated as a customs union under GATT,[142] and is therefore exempt from GATT provisions concerning trade within its boundaries. However, EC trade with third countries must comply with all GATT provisions as well as applicable international conventions.[143] As noted above, GATT allows for the exclusion of cultural industries from certain trade regulations,[144] and international copyright conventions address standards of copyright protection, not trade.[145] Trade in copyright goods between the EC and third countries is therefore not protected by the trade provisions of GATT if those copyrighted goods qualify for the cultural exclusion.

Intellectual property laws have not been an urgent priority in the EC in the past; however, the EC has begun to address that area as it recognizes the economic importance of copyrighted goods and other types of intellectual property.[146] The EC supports the TRIPS agreement and its inclusion in GATT.[147]

C. Copyright Under EC Law

Copyright is not mentioned in the Treaty of Rome, and some critics have remarked that the Treaty of Rome does not apply to copyright because copyright matters do not sufficiently touch upon trade issues.[148] Those critics assert that intellectual property is exempt from EC regulation and left to domestic control under

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140. THE EUROPEAN COMMUNITY AND GATT, *supra* note 76, at 32-33.

141. *Id.*

142. *See* GATT, *supra* note 15, art. XXIV(2)(b).

143. MESTMACKER, *supra* note 139, at 19-23.

144. GATT, *supra* note 15, art. XX(f); *see supra* note 80 and accompanying text.

145. *See supra* notes 77-79 and accompanying text (noting that the United States has sought increased protection for intellectual property).

146. *See* Green Paper, *supra* note 27, § 1.5.10, at 11; *see also* Follow-up to the Green Paper: Working Programme of the Commission in the Field of Copyright and Neighbouring Rights, COM(90)584 final §§ 1.5, 1.8, at 3, 5 [hereinafter Follow-up].

147. Follow-up, *supra* note 146, § 7.2.1, at 21.

148. DAVIES & VON RAUSCHER AUF WEEG, *supra* note 128, at xv.

Articles 36 and 222 of the Treaty of Rome.[149] However, the ECJ has since held that the Treaty of Rome does control certain aspects of intellectual property.[150] Recently the Commission of the EC reiterated its intent to regulate only those areas of copyright that are necessary to fulfill Community goals.[151] The remaining copyright areas will be left to national legislation.[152]

Because copyright is fundamentally a form of protectionism, it conflicts with the free trade ideals championed by the EC. More specifically, there are four principle points which demonstrate a conflict between copyright and current EC law: protection rights under Article 36 of the Treaty of Rome; the free movement of goods and the freedom to provide services under Articles 9-37 and 59-66; the competition rules under Articles 85-94; and the cultural exclusion under Article 36.

1. *Copyright and EC protection rights.* Protection rights, which are essentially the rights of a creator to have his or her intellectual property protected, are viewed as a property right based in Article 36 of the Treaty of Rome.[153] In *Deutsche Grammophon* the ECJ specifically rejected the theory that protection rights granted a creator of intellectual property an opportunity to recoup financial profits as a reward for creative endeavors.[154] Instead, the scope of the protection right includes the exclusive use of the created item[155] as well as the right to distribute copyright products within a territory. However, once consent to distribute the item is given within one

149. HARTMUT JOHANNES, INDUSTRIAL PROPERTY AND COPYRIGHT IN EUROPEAN COMMUNITY LAW 7 (1976). If national laws do apply, it should be noted that the protections and definitions of copyright are not exactly the same within all member states. Although the core protections may be similar, the border areas are gray and may result in a work being protected in one country and not in another. Dietz, *supra* note 20, at 50.

150. *See generally* PORTER, *supra* note 14, at 27-35. The general areas of EC intervention involve the applicability of copyright law within the Community.

151. Green Paper, *supra* note 27, § 1.6.1, at 15.

152. *Id.*, § 1.6.3, at 16.

153. Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmarkte GmbH & Co. KG, 1971 E.C.R. 487, 499-500, 10 C.M.L.R. 631, 641-42 (1971).

154. *Deutsche Grammophon*, 1971 E.C.R. at 509-10; *see also* JOHANNES, *supra* note 149, at 57.

155. JOHANNES, *supra* note 149, at 57-59. The right of exclusive use is one of the rights which may be included in a country's definition of copyright, as is the right of distribution. *See generally* Dietz, *supra* note 20, at 50 (discussing individual countries' different approaches to the questions of distribution and time periods of protection).

member state, the protection right holder is considered to have given consent for distribution within the entire Community.[156]

The rationale underlying the protection right appears to be based in the public-benefit model of copyright theory,[157] which encourages free trade of copyrighted works once the creator has put them on the open market. The monopolistic right of the author lies in the decision whether to make the work available to the public or not; once the work is made publicly available, the author may reap economic rewards but cannot curtail the work's movement within the market. After the work is in the stream of commerce, its utilitarian benefits (whether for industrial or merely artistic use) accrue to the public; the author cannot regain a monopoly over those benefits.[158] This interpretation of Article 36 thus emphasizes the free trade of copyrighted works, since the public is entitled to distribution of an item once it is made available in the market.

2. *Copyright, the free movement of goods, and the freedom to provide services.* The Treaty of Rome requires the abolition of intra-Community trade barriers that distort the free movement of goods and services.[159] Because the practical effect of most domestic copyright laws is to create monopolies within a limited area, tension exists between copyright and the free movement of goods.[160] The case law of the European Court of Justice recognizes this tension, wherein some decisions have given precedence to the protection of copyright and others to the furtherance of EC goals.[161] Most

156. JOHANNES, *supra* note 149, at 74. The court in *Deutsche Grammophon* further held that national legislatures cannot partition territories within the EC which will effectively restrict trade. *See Deutsche Grammophon*, 1971 E.C.R. at 502, 508. Parallel import prohibitions laid down by the domestic copyright law are an illegitimate barrier to intra-Community trade and cannot be allowed. *Id.* The theory of parallel importation rights focuses on the concept that a creator should have only one opportunity to obtain financial remuneration for the item. Once that item has been circulated in one member state, it should be free to circulate in other member states as well. *See* JOHANNES, *supra* note 149, at 10, 16-17.

157. *See supra* notes 19-23 and accompanying text.

158. *See Deutsche Grammophon*, 1971 E.C.R. at 509-10; *see also* Abrams, *supra* note 1, at 1120-21 n.4. For example, a person may publish a cookbook in Britain with the world's best chocolate mousse recipe. The author retains certain rights, such as the right to earn royalties or to decide whether a magazine can publish the mousse recipe, but he or she cannot deny a French bookstore the right to sell the book. Once the cookbook is available to some EC nationals, it is available to all. The public right to the cookbook supersedes the author's previously monopolistic right to dictate types of usage, including limiting distribution to France.

159. EEC TREATY art. 3.

160. *See* van Rij, *supra* note 139, at 34-35.

161. *Id.* at 34.

copyright cases are based on Article 36 of the Treaty of Rome, which allows protection of industrial or commercial property even in cases which restrict imports or exports of goods.[162] In Article 36, copyright is classified as a type of "industrial and commercial property."[163] However, Article 36 also forbids such restrictions if the measure constitutes arbitrary discrimination on the basis of national origin or is a disguised restriction of intra-Community trade.[164] The leading cases defining the free movement of copyrighted goods within the EC are *Deutsche Grammophon*[165] and the *GEMA*[166] case. Trade with non-EC countries was addressed by the *Polydor* case.[167]

In *Deutsche Grammophon*, the ECJ held that parallel import restrictions limiting the internal movement of goods were illegal under the Treaty of Rome, despite national copyright laws to the contrary.[168] A parallel import restriction prohibits the movement of a good available in one member state to other member states.[169] In *GEMA*, the ECJ held that member states may not enact provisions that have an effect equivalent to that of a quantitative restriction on the import of goods, and that royalties payable to copyright holders must be calculated so that the final price of the work is the same throughout the EC. This curtailment of the economic rights of the author in order to harmonize the market effect provides a good model for future EC efforts. In this model, the designation of the good as copyrightable does not affect the economic necessity of harmonization.[170] Although it is true that in certain instances individual authors will receive less money from sales under a harmonized free trade system than from sales under a nonharmonized system, it is

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162. *Id.*

163. P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 226 (1985); *see* EEC TREATY art. 36.

164. *Cf.* EEC TREATY art. 36. Some would argue that any exemption of trade based on culture alone is a disguised restraint of trade. *See supra* note 83 and accompanying text.

165. Although this case dealt with related rights, it laid the foundation for later decisions dealing with copyright *per se*.

166. Joined Cases 55-57/80, Musik-Vertrieb Membran v. GEMA, 1981 E.C.R. 147.

167. Case 270/80, Polydor Ltd & RSO Records Inc. v. Harlequin Record Shops Limited and Simons Records Ltd, 1982 E.C.R. 329.

168. *Deutsche Grammophon*, 1971 E.C.R. at 502.

169. *Id.*; *see also* JOHANNES, *supra* note 149, at 56-57, 61 (arguing in favor of the prohibition of parallel import restrictions).

170. *See* DAVIES & VON RAUSCHER AUF WEEG, *supra* note 128, at 14. Although free trade areas generally do not harmonize regulations to the same extent as do customs unions, the perspective of the EC, that intellectual property goods are not exempt from economic concerns, could be emulated in free trade areas.

likely that overall their revenues will increase due to large market availability of goods.[171] The *Polydor* Court refused to extend the *GEMA* holding to arrangements between member states and nonmember states because the EC has no need and no ability to harmonize the treatment of goods outside the Community.[172] The EC thus is willing to treat copyrightable goods, at least under some circumstances, in the same manner as other goods; however, it is unwilling or perhaps legally unable to do the same when dealing with third countries.

Not all copyrighted items are designated as goods; some are defined as services and are discussed under different provisions in the Treaty of Rome.[173] The freedom to provide services was reviewed in *Coditel I*, one decision in a series of related cases. The first *Coditel* judgment equated the free movement of goods to the freedom to provide services in the area of copyright, and extended the same trade protections to copyrighted services that had been granted to copyrighted goods.[174] Copyrighted items should receive similar treatment regardless of whether they are designated as goods or services in order to provide copyright holders with similar expectations and protections. For example, the holder of a copyright to a film might use two different methods of publication in the EC. The holder may distribute the film as a video, which is a copyrighted good, and as a cable transmission, which is a copyrighted service. *Coditel I* protects the holder from illegitimate trade barriers in both circumstances equally.

This series of cases shows how the EC is moving toward a free trade model of copyright based on market usage rather than a protectionist approach based on traditional expectations of how copyright items should be treated. First, copyrighted goods were seen as a type of property protected from trade barriers by the Treaty of Rome, then the boundaries of the right to free movement of goods were defined, followed by an expansion of the law to include copyrighted services. Subsequent cases decided under the competition rules also support this treatment for copyrighted goods and services.

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171. *Cf.* Related Rights Directive, *supra* note 128, pmbl. (discussing the differences in legal protection between member states).

172. *See Polydor*, 1982 E.C.R. at 329-30.

173. EEC TREATY arts. 59-66 (discussing the freedom to provide services).

174. Case 62/79, Coditel v. Ciné Vog Films, 1980 E.C.R. 881, 881 [hereinafter Coditel I].

3. *Copyright and the competition rules.* Cases under the competition rules also treat copyrighted products as purely economic commodities. The rules, found in Articles 85 and 86 of the Treaty of Rome, forbid the establishment of agreements between companies affecting intra-Community trade in a way that intends to, or has the effect of, restricting or distorting trade.[175] The rules apply to both performing artists and authors' and artists' collecting societies.[176] One concern of the EC is that these societies may restrict trade due to exclusive licensing practices.[177] The ECJ in *Coditel II* had to determine whether the practice in question actually did prevent, restrict, or distort competition.[178] The Court held that a case-by-case determination was necessary to decide whether a practice was anticompetitive. If such a finding was made, the practice was not allowed, even if it was traditionally protected under domestic copyright laws.[179] Although critics welcomed the case-by-case economic analysis required by *Coditel II*, national courts will have a difficult time implementing that analysis.[180] For example, the courts may have some difficulty finding cultural products to be "like products" in competition with one another; instead, the courts might resort to traditional principles which view cultural products as unique, resulting in fewer findings of restrictive trade practices.

The rationale behind applying the competition rules to copyright is simple. If the EC is going to support a free trade system of copyrightable goods and services, it must recognize that analyses which focus on the ways copyright goods are unique, or cultural, rather than on the ways that they resemble other goods are only harmful to the EC's economy. It may at times be difficult for courts, legislators, and governments to avoid the traditional labels put on copyrighted goods and services, but such efforts must be made if full

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175. EEC TREATY arts. 85-86; van Rij, *supra* note 139, at 37.

176. van Rij, *supra* note 139, at 37. Performing societies are not the only copyright entities subject to the competition rules. Artists and authors themselves may be considered enterprises under EC competition law when they commercialize their performances or products. *See* Arved Deringer, *EEC and Antitrust Problems with Respect to Copyright and Performing Rights Licensing Societies*, INT'L BUS. LAW., Feb. 1985, at 65, 67.

177. van Rij, *supra* note 139, at 37-39.

178. Case 262/81, Coditel v. Ciné-Vog Films, 1982 E.C.R. 3381, 3399-4000 [hereinafter Coditel II].

179. *Id.*

180. R. Joliet & P. Delsaux, *Copyright in the Case Law of the Court of Justice of the European Communities, in* COPYRIGHT IN FREE AND COMPETITIVE MARKETS 21, 38 (W.R. Cornish ed., 1986).

advantage is to be taken of the growing market for copyright goods and services.

4. *Copyright and the Treaty's cultural exclusion.* Article 36 of the Treaty of Rome allows materials of cultural significance to be exempted from Treaty provisions regulating trade.[181] Although there are no cases addressing cultural issues as they affect copyright law, a claim for exclusion based on cultural significance may be a disguised regulation of trade on illegitimate grounds, and should be scrutinized carefully.[182]

There is at least one possible circumstance where the invocation of culture to avoid free trade provisions may be legitimate. Under Article 90(2) of the Treaty of Rome, the competition rules may be suspended or limited for public policy reasons. Article 90 limits application of the competition rules to undertakings which supply services in the general economic interest so that the undertakings may fulfill their obligations.[183] Under this article, certain organizations such as authors' or artists' societies could be required to act in such a way as to promote culturally significant works, even if such promotion is unprofitable.[184] National courts determine whether an undertaking is supplying services of a general economic interest and whether any action must be taken.[185] "General economic interest" is to be construed narrowly, but even private undertakings could be included under this definition if they have been given public authority to act in the general economic interest.[186] This procedure is preferable to other methods allowing special treatment of cultural industries because a governmental requirement to produce a certain work is more transparent and easily reviewable than a governmental evocation of a protective provision.

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181. EEC TREATY art. 36.

182. *See supra* note 114 and accompanying text (discussing disguised regulations in the context of NAFTA and CFTA).

183. *See* MESTMACKER, *supra* note 139, at 47.

184. *Id.* at 49-50.

185. *Id.* at 50.

186. Case 127/73, Belgische Radio en Televisie v. SV SABAM & NV Fonior, 1974 E.C.R. 51, 56; *see generally* MESTMACKER, *supra* note 139, at 47-50 (discussing those private undertakings exempted in supplying services of general economic interest).

V. POLICY IMPLICATIONS OF CURRENT LAW AND PROPOSALS FOR THE FUTURE

A. Current Law

Over the years, the principles which support and define copyright have come into direct conflict with theories that advocate free trade, requiring one or both of them to evolve to accommodate modern needs.[187] Currently, national laws define copyright and the levels of protection available for domestic works, but do little to encourage the import or export of copyrighted goods and services. International conventions have standardized protection levels and procedural norms to some extent, but are not meant to encourage trade within free trade areas. The intent of the conventions is to protect copyright holders by granting the holders certain minimum rights as well as the right to national treatment in countries which import their works. The intent of the free trade areas, in the EC and under CFTA and NAFTA, is also to ensure national treatment of goods, but more importantly, to encourage the free flow of trade. However, the use of cultural exclusions can stop that flow at any time. The fact remains that copyrighted material is still considered different from other goods, either on cultural or intellectual property grounds, and as such is singled out for disparate treatment. In today's world, where copyrighted goods comprise a significant and growing segment of internationally traded goods, this differentiation is no longer necessary or helpful to copyright holders.

Just as the theories behind copyright and free trade diverge, so do opinions on how to shape future laws. However, two models exist at the extremes of the theoretical spectrum. One model supports free trade over traditional copyright principles. Those advocating this viewpoint see intellectual property as a valuable commodity on the world market.[188] They feel free trade benefits both the creator, who will gain more profit, and the public, which will have more goods available.[189]

The second model supports existing copyright principles over free trade. This approach attracts those people who feel the commercialization of art has become excessive, and who feel that the original

187. PORTER, *supra* note 14, at 99.
188. *See* JUSSAWALLA, *supra* note 34, at 20.
189. PORTER, *supra* note 14, at 99-100.

rights of the creators must be respected.[190] Another argument in support of traditional copryght reflects the historic importance of cultural influences in society. Cultural diversity is not something that a free market necessarily encourages, although the market does not always destroy culture as has sometimes been claimed.

Perhaps a workable middle ground between the models' two extremes is to allow some protection of culture, but within specified boundaries. One approach might limit cultural protections through predetermined economic standards, such as allowing restrictions of trade only up to a certain monetary amount or to a certain percentage of the gross national product. Protections may also be available through readily transparent means such as the provisions discussed above allowing for the temporary protection of internationally uncompetitive industries.

Both models have their appeal, and it is difficult to decide which should prevail. One aspect to consider before making such a decision is enforceability. Copyright conventions are notoriously unenforceable, and there is no way to give them more power in the global arena. No provisions for enforcement are written into the conventions themselves, and there is no way for the conventions to address infringements by nonparties. However, under the free trade model, enforcement is more of a possibility. Remedies are usually available within the free trade agreement itself, either through dispute resolution techniques or unilateral actions such as the imposition of countervailing duties. Enforcement may even be possible under other bilateral or multilateral trade agreements such as GATT. Once copyrighted goods are no longer subject to special rules and provisions for exclusion and usage, an injured nation could use normal trade remedies, just as when any other industry is harmed. Even those countries that are not especially concerned with copyright issues could be pressured to avoid cultural exclusions if the goods that they value were subject to defensive trade actions.

B. Proposed Law

Traditional domestic laws defining and protecting copyright have been valuable in the past, but the modern world demands a new approach. The goods and services supplied by copyright industries are highly exportable and highly profitable trade commodities, and should be allowed to compete unfettered on the global market.

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190. *Id.*

Although the international copyright conventions now in place provide a valuable service, they cannot be substituted for a market approach to intellectual property. However, copyright conventions have begun to create a global definition of copyright, and that trend should be encouraged so that eventually there is a single set of rules stating how to obtain and enforce copyright. Once those rules are established, the free trade of intellectual property, especially of copyrighted goods and services, will be possible despite their unique copyrighted nature.

One practical and attainable system for the free trade of copyrighted goods and services would use a two-tiered model of continued copyright protection and decreased trade protection. The current conventions would remain in effect and continue to set the standard for copyright protections while the various trade agreements were revised to eliminate any cultural exclusions. This approach would allow copyright holders to reap the financial rewards due them for their labors while disallowing illegitimate use of the copyrighted products and illegitimate restraint of trade. Through the larger markets made possible through the free trade areas, copyright holders could increase their revenue and market appeal without concerns about governmental restrictions of their products based on their classification as cultural in origin.

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